PRACTITIONER ARTICLES

[2006] The Commissioner as a litigant - the *Pacific Exchange* case

by David Marks, Barrister-at-Law

In litigation, what status is accorded the Commissioner's own officers? Should a member of the Bar accept a direct brief from the Commissioner's office (as, frankly, we often do)? What safeguards are needed to ensure appropriate professional distance is maintained by the Commissioner's advisers, so fearlessly independent advice will be provided? And what is the status of an "Appeal Statement" (formerly called a "statement of facts and contentions") filed in an appeal?

Sterner views about case management, articulated by the High Court in *Aon Risk Services* (2009) 83 ALJR 951; [2009] HCA 27, inevitably affect tax litigation.

That is the least noteworthy aspect of Logan J's decision to strike out the Commissioner's late-breaking amended statement of facts and contentions (now called an Appeal Statement) in *Pacific Exchange Corporation Pty Ltd v FCT* [2009] FCA 1155, reported at para [2032] of this *Bulletin*.

The Commissioner has for quite some years relied on in-house officers to fulfil functions in litigation. This is something also seen with other Commonwealth and State departments, and to some extent with corporates. *Pacific Exchange* is an important call for safeguards to ensure professional distance is maintained where there is no external solicitor on the record.

Directly briefing a member of the independent Bar did not remove the potential for hazard, though Logan J was careful to make clear there was no criticism of counsel in this case.

Why an appeal statement?

We have seen previously that the pleading substitute, now called an "appeal statement", must be informative. If it is not, the other party can ask for proper information.

Five years ago, the Commissioner's statement of facts, issues and contentions in *Rio Tinto Ltd v FCT* (2004) 55 ATR 321; [2004] FCA 335 listed 12, complex issues. It stated the "contentions" in each case as "yes", "no", or "nil".

Rio Tinto sought an order that the Commissioner should instead file a document complying with rules requiring "a statement outlining succinctly the Commissioner's contentions and the facts and issues in the appeal as the Commissioner perceives them". (Nowadays, the definition of "appeal statement" in the rules uses the same words.)

In *Rio Tinto*, Sundberg J found that the statement fell "seriously short of the statement contemplated by [the rules]". The most important deficiency is the absence of any stated basis for the contentions in the table of issues and contentions. ... But more is required than a "Yes" or "No" answer to the question posed by each issue.

His Honour also said that a statement of contentions must propound all the necessary ingredients of the claim for which that party contends. A statement that leaves a taxpayer uncertain as to how the case is put against it is embarrassing and oppressive.

So the Commissioner's statement in *Rio Tinto* was removed from the Court file, and the Commissioner was ordered to file a complying statement.

Considering whether to bring an application like that, or for other relief based on the alleged inadequacy of the appeal statement, has become a conventional step in preparing for trial: *Clark* (2007) 67 ATR 224; [2007] FCA 1426. Sometimes the taxpayer tries for too much: *BAE Systems* (2008) 69 ATR 567; [2008] FCA 48; *McDonald's Australia Limited v FCT* (No 2) (2008) 69 ATR 898; [2008] FCA 395.

The "appeal statement" has a practical function. It means the taxpayer and the Commissioner can work out what evidence is actually needed, to meet each other's case. It encourages focus in preparation. It potentially shortens the trial, by removing unnecessary issues.

As Logan J says in *Pacific Exchange*, "... it forms part of an obligation which the Court has to afford the parties to a proceeding procedural fairness. One of the ways in which that particular obligation is fulfilled is by ensuring that a party to a proceeding knows the case it has to meet."

The commissioner's misstep in Pacific Exchange

This decision to refuse to accept an amended appeal statement has to be seen against the long history of the matter.

The Commissioner's investigators met the tax agent in 1998. The taxpayer was already on the radar, and the payments now in issue were disclosed at that meeting. Five years later, there was a further visit, and the investigators downloaded computer files. In July 2003, the ATO notified a taxation audit. A key document now in issue was obtained, which seems to have been a document latterly alleged to have been a sham.

A series of interviews under former s 264 of the ITAA 1936 were conducted, mostly using senior counsel, sometimes with a junior. The last occurred in 2005. Assessments issued in 2007.

Initially, AGS was the solicitor on the record, but the Commissioner commenced to act in person before any court appearances.

In March 2009, at the first directions hearing (called a "scheduling conference"), Logan J twice asked the Commissioner's counsel whether sham was any part of the Commissioner's case. The concern was that the Commissioner had said the key document had been "purportedly" entered into. Logan J sought to clarify what was intended:

"Logan J: ...It is not a case, as it were, where there is a sham allegation. Is that right?

Counsel: No, that's right.

Logan J: ... But it's not alleged that there are documents that are - that the whole transaction is just a sham.

Counsel: No."

And so the taxpayer proceeded to prepare its case. The taxpayer says it made a forensic decision that it was unnecessary to call an incapacitated, overseas witness, for example.

In May, the trial was set down for a 4-day hearing before Collier J starting 13 October. The taxpayer filed its affidavits in June.

On 15 September, less than a month before trial, the Commissioner purported to file an amended appeal statement, which for the first time alleged sham.

An allegation of sham is tantamount to an allegation of fraud (para [48]). It would make the case wholly different from one where all that had to be proved of a document was its authenticity and execution.

The evidence of the taxpayer's solicitor in this case gave details of the additional preparation required and the additional evidence that would have to be sought. The incapacitated, overseas witness would now, perhaps, have to be called.

Logan J pointed out that "it is difficult to see how the granting of leave [to file the amended appeal statement] would do other than carry with it ... an adjournment of the hearing of a taxation appeal, the trial of which has been fixed for many months". Nowadays, a decision whether to allow an amendment ought, in light of *Aon Risk Services*, "be informed not merely by the interests of the parties but also by a wider public interest". This included wasted court dates.

Logan J concluded, on this issue (para [53]):

"At this late stage of a proceeding, and having regard to sentiments evident in Aon Risk Services, the purpose of Tax List directions and of case management generally, it seems to me that it would be procedurally unfair to permit the Commissioner to rely upon the appeal statement in

its amended form. Especially that is so in light of the deliberate statement made in open court six months ago by reference to which the appellant taxpayer has cast its case."

It was ordered that: "The purported amended appeal statement filed on 15 September 2009 be removed from the court file." The Commissioner was to pay costs.

Commissioner acting in person

Logan J pointed to the Commissioner's statutory right of appearance, his statutory right to authorise any person to appear for him, and his right (like most litigants) to choose to act for himself.

An officer authorised to appear for the Commissioner is not, by s 15 of the *Taxation Administration Act 1953*, "clothed with all that a court is entitled to expect from a person on the roll of legal practitioners". It is a right of appearance, not a right to practice.

A litigant in person does not have reposed in him "the same degree of trust and confidence ... in relation to matters of practice, procedure and ethical conduct", as might exist with a legal practitioner on the roll. As an example, litigants in person, who attempt contact with a judge's associate, are generally directed instead to speak with the registry. (This would, one supposes, reduce the risk of having an associate give evidence about such contact. It seems merely to have been given as an example, rather than to raise that point particularly.)

Logan J goes on to say (paras [58]-[59]):

"It seems to me that like sentiments ought necessarily to attend those cases where, for his own reasons, the Commissioner chooses not be represented by a solicitor on the record. In modern times the Bar Rules have been relaxed in a way which permits the direct briefing by a lay client of a member of the Bar. That practice is fraught, though, with the potential of not having a necessary distance that a responsible instructing solicitor introduces into the conduct of litigation.

I cannot help but reflect on whether or not the late filing of a document without leave, which radically changes the complexion of the basis upon which the Commissioner seeks to defend an assessment, was related in some way to the absence of a solicitor on the record. That is not in any way to deprecate the conduct of ... counsel, but merely an observation in passing as to the hazards which are entailed when persons choose to act for themselves."

Take-homes for Government, Corporates and Bar

The take home message for the Commissioner, other government agencies, and corporates, is to foster a philosophy of independence and detachment within the ranks of in-house advisers. This is important for other reasons, such as maintaining client-attorney privilege, mentioned below.

The hazards of not maintaining such distance are apparent, with little thought. And it is more than about paying lip-service to this need for professional detachment. We are judged by our actions, when things occur in open court.

The Courts are very much alive to the question of how independent in-house advisers actually are. The client-attorney privilege cases are exemplars. See Holmes J's summary of the cases, emphasising independence and competence, in *Galway v Constable* [2002] 2 Qd R 146, [2001] QSC 180, paras [13]-[18].

The best way for the Commissioner to overcome any suspicion on this front will be by his actions, as a frequent litigant. This Commissioner is doubtless well-attuned to that need, given previous roles.

There is a take-home point here for barristers, as well. It again needs to be emphasised that Logan J did not pass adverse comment on counsel in *Pacific Exchange*. There was no basis to do so. But it would be foolish to ignore his Honour's comments.

The Queensland Supreme Court has in place a protocol, Practice Direction No 2 of 2006, requiring a barrister to obtain informed consent from a direct access client about the limited ability that a barrister has, unassisted by a solicitor, to provide

representation. My practice is to get that consent from the Commissioner's office, before acting in a collection matter in that Court on a direct brief.

That is fine as far as it goes. Logan J's point is not addressed by paperwork alone. Counsel accepting a direct brief from the Commissioner have a duty to the Court to maintain that independence and fearlessness for which we are paid. The price of maintaining that stance is that sometimes the brief goes back, if the client disagrees with advice.